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**COURT OF CHANCERY  
OF THE  
STATE OF DELAWARE**

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November 23, 2011

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Re: *Hermelin v. K-V Pharm. Co.*,  
Civil Action No. 6936-VCG

Dear Counsel:

As promised, the following is my decision on the scheduling issues presented at the teleconference held on November 21, 2011. After reviewing 8 *Del. C.* §§ 145(a)-(c), the relevant K-V Pharmaceutical Company ("KV") bylaws, and the Indemnification Agreement, I have determined that it would be efficient for discovery purposes for me to provide the parties with

guidance as to the appropriate legal standard in connection with Mr. Hermelin's indemnification claims.

The applicability of mandatory indemnification under 8 *Del. C.* § 145(c) will substantially affect the scope of discovery in this action, in that where Mr. Hermelin is entitled to mandatory indemnification, evidence related to Mr. Hermelin's good faith or lack thereof will be irrelevant, as the governing standard is whether Mr. Hermelin was "successful on the merits or otherwise" in his defense of the action for which indemnification is sought.

Conversely, if the Court finds that Mr. Hermelin was not "successful on the merits or otherwise," the issue then becomes whether permissive indemnification under 8 *Del. C.* § 145(a)-(b) applies. As I read the relevant KV bylaws and the Indemnification Agreement, KV has agreed to indemnify Mr. Hermelin "to the fullest extent permitted by the [Delaware] General Corporation Law."<sup>1</sup> Because 8 *Del. C.* §§ 145(a)-(b) permit a corporation to indemnify a director or officer who has acted in good faith, the inapplicability of mandatory indemnification would require consideration of whether Mr. Hermelin acted in good faith. This latter issue would, as the Defendant has pointed out, necessitate a broader scope of discovery. For this

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<sup>1</sup> Indemnification Agreement § 3(a).

reason, however, I find it economical to resolve the issue of the applicability of 8 *Del. C.* § 145(c), which requires comparatively little discovery, before proceeding to discovery on the issue of good faith.

For the reasons stated above, I direct the parties to submit memoranda addressing which, if any, of the Plaintiff's indemnification claims arise from proceedings in which the Plaintiff was "successful on the merits," thus triggering mandatory indemnification. The memoranda should also address the proper scope of discovery under section 145(a). Those memoranda should be submitted to the Court on a schedule to be provided by counsel in a form of order. If appropriate, I will schedule oral argument on the issue of mandatory indemnification at the parties' earliest convenience following the submission of cross-answering memoranda.

IT IS SO ORDERED.

Sincerely,

/s/Sam Glasscock III

Sam Glasscock III